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No. 85-2123

In The
Supreme Court of the United States
October Term, 1985

EMORY JAY HUCKABY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF UPSON COUNTY, GEORGIA

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October 30, 1986

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QUESTION PRESENTED FOR REVIEW

DOES THE CONCLUSION OF THE TRIAL COURT THAT PETITIONER WAS "IN ACTUAL PHYSICAL CONTROL OF A STOPPED VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL" AND CONSEQUENT ENTRY OF JUDGMENT AGAINST HIM VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the instant proceeding.

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I. STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

II. CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which Petitioner contends is applicable to the instant action is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

III. REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A. Course of Proceedings Below

The Petitioner in this case, Emory Jay Huckaby, was arrested and charged with the offense of driving under the influence by one Sergeant Hoyal. The citation was returned to the Probate Court of Upson County, Georgia, and was scheduled for trial. Petitioner was arraigned and entered a plea of not guilty to the offense on September 23, 1985, waived jury trial, and was tried by the Court on that same day. On September 30, 1985, the Honorable Virgil L. Hamby, Judge of the Probate Court of Upson County, found Petitioner guilty as charged and sentenced him to twelve months imprisonment or payment of a fine of $1,100.00.

Petitioner filed a Petition for Writ of Certiorari to the Superior Court of Upson County, Georgia. By Order of January 10, 1986, the Superior Court affirmed the decision of the trial court. Petitioner applied for discretionary appeal in the Georgia Court of Appeals, and the application was dismissed February 19, 1986. A Motion for Rehearing of that Order was denied March 10, 1986. Petitioner then filed a Petition for Writ of Certiorari to the Supreme Court of Georgia, which denied the writ on April 9, 1986, and denied a Motion for Rehearing on April 24, 1986.

B. Argument and Citation of Authority

Petitioner was charged with a violation of O.C.G.A. § 40-6-391, the Georgia statute which prohibits driving under the influence. Specifically, that Code Section provides that:

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) under the influence of alcohol.

At the conclusion of Petitioner's bench trial in the Probate Court of Upson County, Petitioner was found to have been "in actual physical control of a stopped vehicle while under the influence of alcohol." Petitioner contends that operating a stopped vehicle is not a criminal violation and that therefore his conviction violates the Due Process Clause of the United States Constitution. Respondent submits that no violation of Petitioner's constitutional rights occurred below.

It is true that the statute in question requires that the vehicle driven by the defendant must have been "moving." *Carr v. State,* 169 Ga. App. 679 (1984). However, under Georgia law, the fact that a vehicle was moving may be inferred by the trier of fact. *Fuller v. State,* 166 Ga. App. 734 (1983). In the instant case, the trial court found, in its verdict, that Petitioner had been "in actual physical control of a *stopped* vehicle . . . ." (Emphasis added).

Petitioner seeks to extrapolate from the court's verdict a conclusion that Petitioner's vehicle had *never* been moving, and therefore his conduct was not of a criminal nature. Respondent submits that this is not a correct reading of the trial court's verdict. The trial court rendered a verdict that Petitioner had operated a "stopped" automobile. This conclusion does not mean that Petitioner's vehicle had not previously been moving. The word "stopped" is defined in Webster's New Collegiate Dictionary as meaning to discontinue, to halt, to cease

activity or operation, or a cessation. Webster's New Collegiate Dictionary, p. 1146 (1977).

Thus, in its ordinary meaning and usage, use of the word "stopped" by the trial court clearly implies that the vehicle had previously been moving. Indeed, the trial court's Order bears out such a conclusion. The court specifically noted that the arresting officer testified that Petitioner had "admitted driving [his] vehicle earlier, but [the arresting officer] could not swear the vehicle was moving when he arrested [Petitioner]." Appendix at 2a.

It is submitted by Respondent that the trial court's verdict that Petitioner had been convicted of "being in actual physical control of a stopped vehicle while under the influence of alcohol . . ." was simply a recognition by the trial court that Petitioner's vehicle had stopped at the time he was observed and arrested by the arresting officer and not a conclusion by the trial court that Petitioner's vehicle had not previously been moving. Under Georgia law, even if no one observed the automobile move, so long as there is some evidence of movement, this is sufficient. *Russell v. State,* 174 Ga. App. 436, 437 (1985). In this case, there was testimony that Petitioner had admitted driving the vehicle prior to observation by the arresting officer. Thus, it is submitted that there was sufficient evidence of movement of the vehicle before the trier of fact to support the conviction.

Contrary to Petitioner's assertions, O.C.G.A. § 40-6-391 has not been judicially construed so as to retroactively give it an expanded application. The trial court's finding that Petitioner's vehicle was stopped simply reflects the testimony before the court that Petitioner's

vehicle was stopped when observed by the arresting officer. This is not the same as a finding by the trial court that Petitioner's vehicle had never been moving. Petitioner was tried and convicted of being in actual physical control of a moving vehicle while under the influence of alcohol. While the trial court's verdict, concluding that Petitioner's vehicle was "stopped," may have been less than artfully worded, Respondent submits that that did not violate Petitioner's constitutional rights, and accordingly urges that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the above and foregoing reasons, it is respectfully urged that Petitioner's due process rights in State criminal prosecutions have not been violated, and that the Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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